

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Fruitridge Vista Water Company, a trust, for an order: 1) establishing a moratorium on new service connections; and 2) clarification of Tariff Rule 15 regarding payment for new facilities servicing new applicants.	Application 05-10-005 (Filed October 7, 2005)
Sacramento Housing and Redevelopment Agency and the Housing Authority of the County of Sacramento, Complainants, vs. Fruitridge Vista Water Company, Defendant.	Case 05-10-007 (Filed October 11, 2005)
County of Sacramento, Complainant, vs. Fruitridge Vista Water Company, Defendant.	Case 05-10-011 (Filed October 7, 2005)
David R. Gonzalez & Donna L. Gonzalez, Complainants, vs. Fruitridge Vista Water Company, Defendant.	Case 05-09-011 (Filed September 6, 2005)
Mercy Properties California, Complainant, vs. Fruitridge Vista Water Company, Defendant.	Case 05-09-012 (Filed September 6, 2005)
Victoria Station, LLC, Complainant, vs. Fruitridge Vista Water Company, Defendant.	Case 05-09-027 (Filed September 22, 2005)
Park Place LLC, Complainant, vs. Fruitridge Vista Water Company, Defendant.	Case 05-11-015 (Filed November 15, 2005)

BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES

I. INTRODUCTION

The Division of Ratepayer Advocates (DRA) hereby submits this Brief in opposition to the proposed settlement. For purposes of this Brief, DRA will refer to the settlement as the Fruitridge Vista Water Co.'s (FVWC) proposal, because FVWC is main proponent of the rate base issues.

In summary DRA opposes the settlement as unreasonable, inconsistent with the law, and harmful to Fruitridge's ratepayers. It is unreasonable because less costly and more beneficial alternatives are available to FVWC to improve the water system and earn a reasonable return than rate basing public grants and loans. It is unreasonable because the rate base proposals are not necessary to meeting the water needs of the complainants and less costly and legally valid alternatives are available. It is inconsistent with the law because the settlement would foreclose any prudence review of the reasonableness of the proposed rate base additions. It would also deprive the Commission of its constitutional and statutory reviewing authority and result in rates that are unjust and unreasonable in violation of Section 451.¹ It is harmful to ratepayers because the settlement would double the rates in a community characterized by low-income levels which is incapable of absorbing such "rate shocks."

FVWC is demanding that the Commission must adopt all of the settlement's proposals, or else FVWC will maintain its moratorium application and refuse to serve the existing and new ratepayers. FVWC's refusal to serve is warrantless, unreasonable, and illegal which raises crucial issues of whether FVWC is willing and/or fit to serve as a public water utility.

¹ The term "Section" means a statutory provision of the California Public Utilities Code unless otherwise indicated; "Rule" means a provision of the Commission Rules of Practice and Procedure, unless otherwise indicated.

II. BACKGROUND

A. Ratepayers

FVWC serves a population of approximately 15,000 with 4,800 service connections in an unincorporated area of approximately four square miles which is adjacent to the southern boundary of the City of Sacramento in Sacramento County. The service area is bounded on three sides by the City of Sacramento's water system and on the South by the California Water Service Co.²

FVWC's ratepayers are mostly residential customers with some commercial and light industrial businesses. According to U.S. Census data, the median household income in 1999 was \$28,227. However, the per capita income in 1999 of the FVWC ratepayers was \$11,836 annually, and 59 percent of the households in the FVWC service area have incomes less than 200 percent of the federal poverty level in 1999.³

FVWC projects that the complainants/developers will present 550 new connections.⁴ Under Rule 15, the Main Extension Tariff Rule, FVWC will impose on the new ratepayers as they come on line a special facilities fee "complete construction of infrastructure to serve that growth."⁵ The settlement admits that these special facilities fees cannot be rate based because they constitute contributions in aid of construction.⁶

The settlement proposes a total cost of \$12 million to supply both the existing and new ratepayers which was itemized as follows: \$6.3 million in infrastructure costs and \$5.7 million associated with the buy-in and purchase water costs with the City of Sacramento, for a total of \$12.0 million. The existing ratepayers need 3.24 million gallons per day (mgd) or 2,250 gallons per minute (gpm), and the new 550 ratepayers will need 1,300 gpm or 1.87 mgd. The projected \$12 million will come from the

² Ex. 1, *DRA Dir. Testimony* at 2; and *Re FVWC*, Comm. Res. W-4252, 2001 Cal. PUC LEXIS 638, at *14 – *15 (dated June 4, 2001) ("In the unincorporated areas known as Fruitridge Vista Units, Sandra Heights, Pacific Terrace Units, Bowling Green Units, and all immediately adjoining territory in Sacramento County including all territory contiguous to the southerly limits of the City of Sacramento.")

³ TR 31:13 – 32:23, D. Jones/DRA; Ex. 2, U.S. Census data re FVWC service area/ DRA.

⁴ TR 26:21 – 27:9, R. Cook/FVWC.

⁵ See *FVWC Appl.* filed 10/27/05 (requesting clarification of Rule 15); Ex. 8, DRA Reply at 17.

⁶ Ex. 1, *Prop. Settlement* at 10.

following sources: DHS Drinking Water Treatment and Research Fund, a new special facilities fee, an expected 20-year financing agreement with the City of Sacramento, an expected State Revolving Fund zero interest loan, and ratepayers.

The settlement “assumes the City of Sacramento (City) will finance up to 1.13 million gallons per day (MGD) of the buy-in fee it charges via a 20-year financing agreement at the City of Sacramento’s Pool A rate.”⁷ However, DRA found that depending on the amount of water that FVWC purchases from the City, the DWTRF and SRF funds may be sufficient and no City financing would be needed. .⁸

B. Proposed Rate Base and Rate Increases

Most of FVWC’s ratepayers are residential customers who currently pay flat rate \$15.69/month. The settlement proposes to immediately increase the rate base by \$1.98 million which would earn a rate of return of 11% and raise rates \$4.38/month.⁹ Additionally, ratepayers would pay a surcharge of \$2.18/month for repayment of the SRF loan. The total residential flat rate would then become \$22.25/month. However, the settlement omits mentioning and DRA finds that the DWTRF and/or the SRF interest free loan are the sources for the \$1.98 million.¹⁰

Further, the settlement proposes that the rate base would increase by another \$5 million (earning a rate of return of 10%) when FVWC pays DHS \$5 million for the DWTRF grant, out of recoveries from FVWC’s pollution lawsuit.¹¹ DRA estimates \$5 million bump to rate base would incrementally raise rates another \$11/month, resulting in an approximate total of \$33/month, more than double the current rates.¹² The settlement

⁷ *Id.* at 9.

⁸ Ex. 8, DRA Reply at 7.

⁹ This is “phantom” rate base because it is uncertain whether this amount will have to be expended to purchase City water. By including \$1.98 million in rate base, FVWC will unjustly be recovering a speculative rate base.

¹⁰ *Id.*

¹¹ Ex. 1, *Prop. Settlement* at 12.

¹² This is DRA’s calculation is as followings: because a \$2 million rate base increase would result in a \$4.38/month, then a \$5 million increase would be 2.5 times \$4.38 = \$10.95/month increase.

does not present rate increase resulting the \$5 million but implies that total monthly rates would fall in the range of \$30 – \$35.¹³

C. The Infrastructure

FVWC presently has a total of 13 active wells,¹⁴ 50 miles of mains, and no large storage tanks. FVWC depends on pumps proximately located next to its wells for adequate water pressure. FVWC's present rate base amounts to approximately \$1 million, and the Utility has not applied to increase its rate base and rates for the past six years.¹⁵

D. Prior Rate increase

By Draft Advice Letter accepted on April 4, 2000, FVWC applied for an increase in rates to recover increased operating expenses.¹⁶ According Commission Resolution (Res.) W-4252, which decided the FVWC advice letter application, FVWC did not request recovery of rate base for infrastructure improvements in its 2000 Advice Letter. Instead the major issue was FVWC's requests of \$190,000 for management salaries in test year 2000, which included "\$85,000 for the Financial Manager," Robert Cook Sr.; "\$90,000 for the General Manager," Robert Cook Jr.; and "\$15,000 as extra compensation to the General Manager for dealing with specific issues relating to the MTBE contamination of FVWC's wells."¹⁷ The Commission approved the management salary requests of \$90,000 and \$85,000, but denied the \$15,000 extra compensation.¹⁸

¹³ Ex. 1, Prop. Settlement at 10.

¹⁴ Four of these wells are not in use at this time – Nos. 11, 12 are inactive, No. 15 is standby and No. 2 is "off line" (inactive) due to toxic contaminations of MTBE, PCE and concerns over TCE, iron and manganese. The settlement agreement requires Wells No. 1, 2, 11, and 12 be destroyed.

¹⁵ See TR 13:22 – 14:5, Cook/FVWC.

¹⁶ *Re FVWC*, Append. E, Comm. Res. W-4252, 2001 Cal. PUC LEXIS 638, at *1–*3 (dated June 14, 2001). See Tr. 8:24 – 28; 13:28 – 14:5; Cook/FVWC (since 2000, FVWC has not applied for another rate increase).

¹⁷ *Id.* at *29–*30.

¹⁸ *Id.*

E. The MTBE Pollution Lawsuit

In 2001, FVWC brought a pollution lawsuit against 12 or more “corporate members of the gasoline industry” for causing MTBE contamination of FVWC’s water supply. The litigation is a jury trial involving over 20 law firms, will begin in April 2006, and likely will take months to conclude.¹⁹

F. Compliance Orders

On January 6, 2003, the California Regional Water Quality Control Board (CRWQCB) ordered FVWC to submit technical reports under Water Code §13267 for groundwater well testing. To date, FVWC has failed to submit the required well testing reports to CRWQCB. According to the CRWQCB, the FVWC has not been cooperative:

[The] Regional Board staff. . .have had numerous meetings and telephone conversations regarding the testing of these wells . . .staff believed FVWC representatives had agreed to the well testing, but were informed that the testing would not be done. As authorized by §13267, FVWC is required to submit ...findings...by March 15, 2003.

The Department of Health Services (DHS) has found that FVWC has failed to maintain adequate and safe pressure in its distribution system.²⁰ Over a 12 month period from May 2002 to June 2003, the DHS recorded 25 instances of low pressure violations. In June 2004, a DHS field inspection found that FVWC system’s source capacity was approximately 75% of the required minimums²¹ and met only 87% of the fire flow requirements (excluding any other water usages) for a system of this size and type. In a 2004 Compliance Order No. 04-01-05-CO-002 (DHS Order), DHS concluded that “FVWC has not demonstrated the ability to consistently and safely maintain a minimum operating pressure of 20 psi in the distribution system.”²² As of the date of the hearing in

¹⁹ See “Fifth Amended Complaint,” in *D.J. Nelson, Trustee et al. dba FVWC vs. Atlantic Richfield Co. et al.*, civ. docket no. 02AS00535, Sacramento Cnty Sup.Ct., on file with DRA. According the Court Clerk for the Sacramento County Sup. Ct., the trial for the FVWC lawsuit will begin on April 17, 2006.

²⁰ The DHS pressure standards of 20 pound per square inch (psi) are lower than the requirements of the Commission’s General Order (G.O.) 103 of 40 psi.

²¹ Per the California Water Works Standards, Title 22 of the California Code of Regulations (CCR).

²² Low water pressure threatens the adequacy of local fire protection services, impacts water quality and public safety, and may allow pathogens to enter the distribution system creating a health risk to

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this matter, March 13, 2006, FVWC has yet to comply with the DHS Order and remedy the low pressure violations.²³ The Commission should not reward FVWC's disregard of DHS's and CRWQCB's Orders by approving a settlement that will unjustly enrich FVWC's owners but instead penalize FVWC for deliberating neglecting the water system and failing to comply with DHS's requirements.

G. The "Will Serve" Complainants

In September 2004, a number of real estate developers asked FVWC for "will serve" letters. FVWC refused these demands for water claiming a water shortage emergency. Subsequently five developers filed complaints with the Commission against FVWC which in response applied for a moratorium on new connections. The complainants argue that FVWC has no water shortage because FVWC can purchase water from the City of Sacramento to meet their needs, and DHS will provide loan financing for such purchases and system improvements. On October 27, 2005, the Commission consolidated the five complaints and application for a moratorium. The parties invoked the Commission's mediation process and were to meet with a mediation-trained Administrative Law Judge in December 2005.²⁴

H. DHS' Public Funds

In mediation which began in December 2005, DHS stated it will offer FVWC a grant of \$5.12 million in Drinking Water Treatment and Research Fund (DWTRF) and approximately \$2 million in loans from the State Revolving Fund (SRF). The SRF loan would carry an interest cost of 3% compounded annually and over a term of 20 years. The Complainants have also offered to pay a special facilities fee for the water and facilities needed to serve them.

FVWC has insisted that its rate base be increased by the amount of the DWTRF and SRF funds that it receives and that FVWC earn a rate of return of 10% or 11% on those public monies. In late January 2006, DRA opposed FVWC rate base proposals

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consumers.

²³ See Tr. 76:27 – 77:22, C. Lischeske/DHS.

²⁴ *Scoping Memo and Ruling of Assigned Commr* at 12, dated Dec. 14, 2005.

inter alia as unfair to the ratepayers and violating Commission policy against including public monies as rate base. Consequently, DRA was excluded from further mediation and denied drafts of the settlement.

The proposed settlement proposes to increase rate base by approximately \$5 million, if FVWC were to win sufficient litigation recoveries from a pollution lawsuit to pay back DHS that amount. The jury trial of the pollution lawsuit will begin in April 2006. It is entirely speculative what that outcome will be.

Notwithstanding the \$5 million, the settlement proposes to currently increase rate base by \$1.98 million, which is derived from the DWTRF and/or the SRF funds. Rates would be increased to recover (at a rate of return of 10%) the \$1.98 million added to rate base, and concurrently ratepayers would be surcharged for repayment of the \$2 million SRF loan.

I. Bifurcation

During the hearing, DRA moved to bifurcate the rate base issue from the issue whether FVWC could presently serve the complainants. DHS has not made it a prerequisite to offering the DWTRF or SRF funds that these public monies be rate based. Only FVWC is requiring that the Commission adopt its rate base proposals as a condition to serving the complainants.

The Presiding Officer, ALJ Glen Walker, denied DRA's motion to bifurcate, which if granted FVWC would have rejected the settlement, maintained its moratorium application, and refuse to serve the complainants. Thus, FVWC was actually informing the Commission Notwithstanding this or any other Commission proceeding, FVWC is under a present and continuing obligation to comply with the outstanding DHS and CRWQCB orders. According to DHS testimony, DHS is providing FVWC a DWTRF grant of \$5.12 million and an interest free SRF loan of \$3.27 million.²⁵ By statute, FVWC must pursue its pollution lawsuit and pay back the DWTRF \$5.12 million grant from its litigation recoveries if they are sufficient. Further, FVWC must bill and collect from ratepayers a surcharge for repayment of the \$3.27 million SRF loan. The evidence

²⁵ Tr. 76:27 – 77:22, C. Lischeske/DHS.

of record shows that DHS does not require as a prerequisite to receiving either the DWTRF or SRF funds that any of these public monies must be included in rate base.²⁶ DHS did not sign the settlement.

J. All or Nothing

At the hearing, Assembly member D. Jones and DRA asked the Commission to bifurcate the rate base issue from the issue of whether FVWC could presently serve the complainants. DRA does not oppose FVWC accepting the DWTRF and SRF funds to comply with the DHS and CRWQCB Orders and to serve the existing ratepayers. DRA supports the use of the Rule 15 Main Extension Tariff to impose a special facilities fee on the new ratepayers as they come on line.

However, if the Commission rejects any individual provision of the settlement, FVWC et al. will withdraw the Settlement and seek to litigate the cases.²⁷ In other words, FVWC maintain its moratorium application against the complainants and apparently refuse to serve the existing and the new ratepayers, despite the availability of DWTRF and SRF funding.

III. ARGUMENTS AND AUTHORITIES

A. The Proposed Settlement is unreasonable.

1. FVWC has the resources and the duty to serve the existing and new ratepayers, whether not public funds are added to rate base.

DHS is providing FVWC with a DWTRF grant of \$5.12 million and an interest free SRF loan of \$3.27 million.²⁸ The purposes of these public funds – a total of \$8.39 million – are to enable FVWC to comply with the DHS and CRWQCB compliance orders, purchase enough water from Sacramento City to serve existing ratepayers, and improve its infrastructure mains, pumps, and interconnects. In addition, FVWC can impose a special facilities charge to the 550 new ratepayers to purchase water or drill new

²⁶ *Id.*

²⁷ Ex. 1, Prop. Settlement at 11.

²⁸ Tr. 76:27 – 77:22, C. Lischke/DHS.

wells for their water needs. Indisputably, a moratorium is unjustified because the evidence of record proves that FVWC has the financial resources and the water is available to serve the complainants and existing ratepayers.

The only obstruction is FVWC's refusal to serve if the Commission rejects its rate base proposals. DHS is not asking the Commission to rate base any amount of return 10% to 11% for an indeterminate period. However, DHS has not made rate basing a prerequisite to granting the \$5.11 million DWTRF or the \$3.27 SRF funds. Nor is the Rule 15 Main Extension Tariff contingent on the outcome of the rate base issues in this matter. If the Commission rejects the settlement because of the rate base issue, DHS will not withdraw the DWTRF or SRF public monies.²⁹

FVWC has represented to the Sacramento County Superior Court, that it has the legal duty and responsibility "for purveying clean, safe drinking water to approximately 4,800 homes and businesses in the County of Sacramento, California."³⁰ As part of that legal obligation to serve, FVWC must comply with DHS and CRWQCB orders and provision existing and new ratepayers, especially when it is proven that FVWC has the resources and the means to carry out its public duty. FVWC is refusing to act responsibly and lawfully because the Commission may not give it what it wants.. This is a *de facto* and blatant defiance of Commission authority. DRA requests that the Commission respond appropriately to such unlawful conduct.

2. Less costly and valid alternatives are available other than illegal rate basing.

The Commission has provided expedited ratemaking procedures for FVWC and other Class B water utilities. At any point during the past six years since its 2000 Advice Letter, FVWC could have applied for a general rate increase via advice letter and not formal application. Further, a "rate of margin" increase may be available to FVWC since it last rate review in 2000. As DRA witness Kerrie Evans testified,

²⁹ See *id.*

³⁰ FVWC's own admission of its public duty to serve as stated in its "Fifth Amended Complaint," at p.3, lines 8-9.

So there are mechanisms available to Fruitridge to make it viable that are in place right now, as opposed to what's suggested in the settlement if we move forward with the solution.³¹

DRA submits that FVWC has unclean hands that militate against accepting its rate base proposals. Because FVWC has refrained from investing its own monies to improve the water system, why should the Commission give any weight to FVWC's proposal now to augment its rate base? Is the salient difference that from 2000 to the present, FVWC would have had to put its own monies at risk, whereas now it could increase rate base and earn a 10% or 11% rate of return using public monies instead of its own capital? DRA asserts that it is no coincidence that FVWC is now insisting on increasing rate base, when DHS has given it DWTRF funds. Apparently, FVWC is only willing to meet its obligations to customers only on terms it dictates. The Commission must reject the settlement on that basis..

FVWC claims that approving the addition to rate base of approximately \$5 million will provide an incentive to litigate its pollution lawsuit.³² However, FVWC admits that it is legally bound to aggressively pursue the pollution lawsuit, regardless of whether its rate base is augmented by public monies. Analogously, FVWC has the legal duty provision existing and new ratepayers with safe and clean water, regardless if the Commission should deny its ratemaking proposals. More compellingly, the record proves that DHS has given FVWC the financial resources to provision water regardless of any ratemaking action by the Commission. Therefore, the ratemaking issues advanced by FVWC are irrelevant, immaterial, and beyond the scope of this proceeding. The Commission should deny the rate base proposals in the settlement and order FVWC to fulfill its public duty as a water utility.

The evidence proves that FVWC has neglected improvements to the water system because it did not want to spend its own money. Is it a coincidence that now DWTRF are available, FVWC is insisting on increasing rate base – but not with its own capital but with public monies and have the ratepayers pay for the profit earned on these funds.

³¹ TR 125:28 –126: 3, K. Evans/DRA

³² TR 15:20 – 16: 2, Cook/FVWC referring to p. 12 of Ex. 1, Prop. Settlement.

Therefore, the general public is doubly burdened. The DWTRF is a grant . and ratepayers will pay for the profit earned on this rate base at 10% or 11%. This is unjust and the Commission should reject this option.

B. The Proposed Settlement is inconsistent with the law.

1. The Commission prohibits adding public funds to rate base and earning a return on it.

In Commission Decision (D.) 06-03-015, dated March 2, 2006, the Commission prohibits investor-owned water utilities and their shareholders from profiting in any way through the receipt of public funds. This Decision not only applies to Proposition 50 grant funds but to “all future state grant funds received by all classes of regulated water utilities.”³³ At Conclusion of Law 2, the Commission provides for the adoption of rules “that ensure that utilities and their shareholders will not be able to profit in any way through the receipt of public funds.” In Ordering Paragraph 1, the Commission directs that the rules attached in Appendix A are adopted. Those rules generally provide:

No return shall be earned by Commission-regulated water utilities (Utilities) on grant-funded plant. No gain shall be recovered by utilities on the disposition of Proposition 50 grant-funded plant.³⁴

As we have discussed earlier, government provided funds, such as Proposition 50 grant funds are categorized as Contributions by this Commission and the USOA.³⁵

DRA therefore asserts that the proposed settlement is inconsistent with the law insofar as it proposes to increase rate base by \$7 million which includes the “phantom” \$1.98 million and the \$5 million of the DWTRF at rate of a return of 10%. on such public funds. The Commission in no uncertain terms prohibits these ratemaking proposals of the settlement.

³³ *Op.re Receipt and Use of All Future State Grant Funds*, D. 06-03-015 at 2, mimeo, dated 3/2/06.

³⁴ *Id.* at Append. A, paras. 1 & 2.

³⁵ *Id.* at 17 note 17.

- 2. Before FVWC may increase rate base, Section 454 requires FVWC to prove that an increase to rate base and the resulting rate increase are reasonable and justified. The proposed settlement would deprive the Commission of its reviewing authority which is illegal.**

Section 454, subsection (a), states in pertinent part that

[N]o public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified.

The proposed settlement would deprive the Commission of its State constitutional and statutory reviewing authority in Section 454 as follows:

Upon either recovery and investment, or reimbursement of Drinking Water Treatment and Research Funds to DHS, Fruitridge Vista will file a Rate Base Offset Advice Letter with the Commission's Water Division to update its ratebase, consistent with this agreement. The purpose of the advice letter will be to provide notice of the update to ratebase and access to documentation of Fruitridge Vista's calculations. California Public Utilities Commission approval of this settlement means that this ratebase treatment of Fruitridge Vista plant, up to \$5.0 million, is not subject to future litigation, either in response to an advice letter or in future general rate cases or otherwise. [Emphasis added.]³⁶

In other words, if the Commission were to adopt the settlement, FVWC would not have to justify or show the reasonableness of its adding \$5 million of DWTRF funds to rate base. FVWC would only have give “notice of the update to ratebase” via advice letter. The settlement would permit no Commission or other legal review of the proposed rate base treatment, whether in response to the advice letter notice, future FVWC general rate cases, or otherwise. The Commission would abdicate its constitutional and statutory role if it were to adopt the proposed settlement. Therefore, the proposed settlement is legally invalid and should be rejected.

³⁶ Ex 1, Prop. Settlement at 8.

3. The proposed settlement would have the Commission decide ratemaking issues based on speculative or hypothetical future events.

Whether FVWC will recover any damages from its pollution lawsuit is conjectural. The jury trial will begin in April 2006, take months to conclude, and at this time its outcome is wholly unpredictable. FVWC admitted as much in the following testimony:

Q: So no funds can be expected to be received from those pollution defendants until such time as either they have a settlement agreement, or they are ordered to pay, and execution proceedings are brought against their assets to turn that judgment into money. Would that not be accurate?

A: I am not going to speculate, because I don't know exactly who the defendants are and under what circumstances they might be held accountable, but based on what I do know, I believe that this matter is in a posture where it is going to require and has required litigation in order to obtain recovery; something, I might add, which the Fruitridge Vista Water Company is directed to do by statute.³⁷

Nevertheless the proposed settlement would have the Commission decide on basis of speculation instead of established facts:

In the event that Fruitridge Vista is able either to recover monies directly from polluters, or to reimburse the Drinking Water Treatment and Research Fund for funds awarded to it, the parties agree that plant initially funded by these monies or direct investment of such monies into the system, up to \$5.0 million, will be ratebased and earn a return of 10%.³⁸
[Emphasis added.]

Section 1706 requires that the Commission base its decisions on findings of facts and not speculation or hypothetical future events.³⁹ Otherwise, any party could construct any hypothetical based on any assumptions and demand on such shaky grounds that the Commission decide a factual or legal issue. It is also premature to assume that all monies

³⁷ TR 50:26 – 51:9, Cook/FVWC.

³⁸ Ex. 1, Prop. Settlement at 8.

³⁹ See e.g., *Re Socal Water Co.*, D. 01-02-043, 2001 Cal. PUC LEXIS 118, at *17 (dated February 8, 2001) (Commission decision alleged as erroneous based on “political speculation”).

received from the pollution litigation should be assigned to shareholders. For example, in the San Gabriel Water-Fontana District rate case the issue of the allocation of monies received from lawsuits associated with water contamination is currently being decided. Although no final decision has been issued in the case, the Administrative Law Judge has already indicated to the parties that it would proposed to allocate 75% of the funds to ratepayers and 25% to shareholders.⁴⁰ When and if FVWC were to receive any settlements or court awards, it should follow Commission processes and make the proper showing to increase rate base at that time. The Commission should reject the proposed settlement as improperly based on speculation and prematurely deciding the ratemaking allocation of any pollution lawsuit proceeds.

C. The Proposed Settlement is unfair to and would harm the ratepayers.

1. FVWC has unclean hands which militate against accepting the settlement.

The history of FVWC indicate the settlement's rate base proposals are another pattern and practice of self-aggrandizement. In 2000, FVWC requested to increase rates via advice letter, which was largely based on raising management salaries to \$190,000, for Mr. Cook Sr. and his son Mr. Cook Jr. Even though after 2000, DHS and CRWQCB found the FVWC water system deficient, FVWC has not applied for a rate increase since 2000 and to the present. As ratepayer witness Debbie McVay stated,

I find it negligent that this water company hasn't slowly increased the rates to repair the infrastructure to keep the service that they are already committed to provide up to a standard that the consumer deserves. I don't understand that. We wait until we get to a point where this huge amount of money is now required to address all of these problems, and it looks like a bail-out to me. I don't understand it.⁴¹

For the past seven years, FVWC has not addressed its pumping equipment problems.⁴² Also, FVWC claims that approving the addition to rate base of

⁴⁰ Re San Gabriel, A.05-08-021, TR vol. 8 at . 777, on file with DRA.

⁴¹ TR 97:4 –11, D. McVay/ DRA witness.

⁴² TR 14:13 –16, Cook/ FVWC.

approximately \$7 million will provide incentive to litigate its pollution lawsuit. However, FVWC admits that it is legally bound to aggressively pursue the pollution lawsuit, regardless of whether its rate base is augmented by public monies.⁴³

FVWC has long neglected the water system and the ratepayers. FVWC now promises to invest in the water system. However, these are mere promises belied by the settlement's provision that no one may legally challenge FVWC in enforcing or construing the settlement once the Commission approves it. The Commission should reject the settlement as harmful and unjust to the ratepayers.

2. If adopted, the proposed settlement would subject ratepayers to hidden or unforeseen costs that impose unreasonable burdens on the ratepayers.

Assembly member David Jones testified:

As we heard at this hearing today, the settlement agreement does not include amounts the ratepayers may be charged for the cost of water being provided. And there are other potentially hidden costs as well that might be passed on to the ratepayers.⁴⁴

DRA's Reply by Kerrie Evans confirms Assembly member Jones' testimony as follows:

The proposed costs do not include the cost of the water from the city. The "buy-in" fee set at \$5.7 million dollars does not include the annual cost for the water itself at \$187/acre foot. For example, if the company buys-into the city for 3.5 MGD, the associated annual water purchase cost will be for 278 AF or another \$50,000.⁴⁵

FVWC did not rebut DRA's evidence of hidden costs. For example, Kerrie Evans was not cross-examined regarding her above stated Reply testimony.⁴⁶ Therefore FVWC failed to rebut DRA's evidence the proposed settlement would harm the ratepayers.

⁴³ TR15:20 – 16:2,

⁴⁴ TR 43:12 – 22 and 45:14 – 18, D. Jones/ DRA

⁴⁵ Ex. 8, DRA Reply at 24.

⁴⁶ See TR 112: 3 – 15, K. Evans/DRA (cross-exam based on hypothetical general rate case application).

FVWC misrepresents that rates would only rise to \$22 per month under the settlement. As Assembly member Jones accurately noted:

Q: And consistent with those representations, if the settlement agreement is approved, the rates would increase to approximately \$22. Is that correct?

A No. The settlement agreement actually contemplates a two-phase rate increase, which could go as high as \$30. And, as the testimony in this hearing indicated, the settlement agreement fails to acknowledge other hidden costs, such as the cost of providing the water from the City of Sacramento to ratepayers, to depreciation, and tax benefits. So I don't believe your statement's accurate.⁴⁷

According to DRA's Reply, the proposed addition of \$5 million to rate base would likely double or triple present rates of \$16.59 per month:

According to the [Settlement Agreement], \$5.0 million of the DWTRF funding (total of \$5.11 million), becomes ratebased when the pollution damages are paid by the defendants in the ongoing litigation. This is "phantom" ratebase because not one dime of the money comes from the owners. This phantom ratebase guarantees a profit at a 10% rate of return, which means ratepayers will pay approximately \$500,000 per year in profit. In less than 10 years, ratepayers will have totally paid back the DWTRF funds through this phantom ratebase of \$5.0 million (depreciation and tax treatments associated with the phantom \$5.0 million ratebase must be considered).

It is irrefutable that proposed Settlement portends unreasonable and significantly high rate burdens for the ratepayers. Apparently, the complainants supporting the settlement are indifferent to the plight of the ratepayers because they are more concerned with getting water. However, when the complainants become ratepayers the potential harmful consequences of the settlement will fall on them as well. The Commission should reject the settlement as inequitable to the ratepayers.

⁴⁷ TR 43:12 – 22, D. Jones/ DRA

3. The settlement is indifferent to the ratepayers' plight.

According to unrefuted evidence of record, the ratepayers in FVWC's service area consists of many individuals who are seniors living on fixed and limited incomes. U.S. Census data reflect that 59 percent of the households in the FVWC service area have incomes less than 200 percent of the federal poverty level in 1999.⁴⁸ As Assembly member Jones stated, "[t]hey do not have the wherewithal to pay for the rates that are being called for in this settlement agreement; but more broadly, I don't think it's fair that they be asked to do so."⁴⁹ The Commission should therefore reject the proposed settlement as threatening severe harm to ratepayers who are the least capable to bearing the potentially high rates under the settlement.

IV. CONCLUSION

Pursuant to Rule 51.7, the Commission may reject the proposed settlement whenever it determines that the settlement is not in the public interest. If the Commission rejects the settlement, it can propose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief.

DRA respectfully requests that the Commission apply Rule 51.7 and reject the settlement's rate base proposals and order FVWC to serve the existing and new ratepayers. DHS has given FVWC the financial wherewithal to comply with outstanding DHS and CRWQCB orders, to buy the necessary water, and to improve the water system. This is FVWC's legal responsibility under any circumstances.

However, FVWC will not provision water to ratepayers if the Commission does not unconditionally and wholly accept the settlement. This is extortion. If FVWC unreasonably refuses to serve, the Commission should consider instituting enforcement and contempt proceedings to deter such unlawfulness.

Respectfully submitted,

⁴⁸ TR 32:20 – 23, D. Jones/DRA

⁴⁹ TR 38:28 – 39:4, D. Jones/DRA.

/s/ CLEVELAND W. LEE

Cleveland W. Lee
Staff Counsel

Attorney for the Division of Ratepayer
Advocates

California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415)
Fax: (415) 703-2262

March 23, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES** in **A.05-10-005 et al.** by using the following service:

☒ **E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

☐ **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on March 23, 2006 at San Francisco, California.

/s/ ALBERT HILL

Albert Hill

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address and/or e-mail address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.
